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To: Microsoft ATR
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Subject: Microsoft Settlement

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I am writing to submit my comments on the proposed settlement between Microsoft and the U.S. Department Of Justice. For nearly twelve years now, I have worked in the computing industry. For nine of those years I have been a freelance consultant, and have thus been able to observe the activities of a wide range of companies. I have no affiliation either with Microsoft or any of its competitors. For the reasons I shall set out below, I am strongly opposed to the settlement in its existing form.

Whenever someone is found to have broken the law, they are subject to sanctions. Those sanctions vary according to the nature of the offence, but in all cases they have three main components. They provide for an appropriate punishment, they attempt where possible to compensate those who suffered as a result of the offence, and they endeavour to ensure that there is no likelihood that the convicted person will re-offend. Although different weight will be given to different aspects depending on the nature of the offence - criminal or civil, major crime or petty misdemeanour, etc - some aspect of these three elements is always present. What makes the proposed settlement in the Microsoft case unique, is that none of those elements are present.

To take these three elements in order, let us first look at punishment. Clearly, there is no element of punishment whatsoever contained in the proposed settlement. Microsoft have been found to have been operating an illegal monopoly for the best part of a decade, making excessive profits as a result, and yet no punitive sanctions are being imposed. Yet it has long been a golden rule in the law that a criminal must not be allowed to profit from his crimes. Where someone is convicted of drug-dealing or fraud or gun-running, the courts quite rightly seize their assets. If a murderer seeks to profit by writing a book about his crimes, the law steps in to ensure he cannot make money from his notoriety. Yet in this case, the law seems perfectly happy for Microsoft to profit from their illegal activity. Despite the clear fact that this money was obtained, at least in part, by unlawful means, no action is to be taken. This seems to me wholly incompatible with the basic principles of natural justice. Microsoft have made money illegally, and they should not be allowed to retain it.

The proposed settlement is equally silent on the subject of compensation of victims. Now clearly in this case, the facts make it hard to ascertain exactly the extent of the loss suffered by any given party. Yet it is clear that there have been victims of the Microsoft monopoly. Companies like Digital Research and Netscape have been demonstrated to have suffered directly as a result of Microsoft's actions. Yet the proposed settlement is completely silent with regards to any form of redress.

On the face of it, the settlement seems primarily directed at the third element described, that of preventing the possibility of re-offending. Yet even here, despite that focus, the settlement is sadly lacking. Indeed, far from demolishing Microsoft's illegal monopoly, it seems rather to entrench it in place. Furthermore, the vagueness of the language makes it almost certain that confusion and further litigation will arise. I have a law degree myself, and I can recognise potentially litigious drafting when I see it. The proposed settlement is riddled with such language.

To take just one example, section III C 2 states that Microsoft shall not restrict an OEM from :
"Distributing or promoting Non-Microsoft Middleware by installing and displaying on the
desktop shortcuts of any size or shape so long as such shortcuts do not impair the
functionality of the user interface."

How does the court propose to define impairment of functionality ? Does replacing Microsoft functionality with equivalent non-Microsoft functionality count ? Does changing the look and feel of the desktop constitute impairment ? Would modifying permission levels or unhiding hidden files or directories count ? This kind of language permeates the proposed settlement, and is wide open to abuse and distortion.

Furthermore, no part of the settlement actually addresses the problem of how to dismantle the Microsoft monopoly. The proposed settlement might be fine had it been enacted ten years ago, before Microsoft's monopoly had been established. Yet the monopoly is here, it is well-established, and different remedies are required, ones which actually encourage competition and actively seek to break up the existing distorted marketplace.

It seems to me that there are two key elements to this. The first is to ensure that competing companies cannot be shut out of the marketplace, and the second is to ensure that consumers are able easily to migrate between Microsoft and non-Microsoft products as easily as possible. The proposed settlement goes some way towards this with its sections on OEM licensing, but this on its own is by no means enough.

To take a prime example, one of the major ways in which Microsoft locks in customers and excludes competitors is through the use of proprietary file formats. The .doc files of Microsoft Word, the .xls files of Microsoft Excel, and so on. Although there are some competing products which do a reasonable job of handling these formats, none are able to do so perfectly. A consumer, especially a large business, which has a large body of information stored in files of this type is therefore deterred from moving to a rival by the costs involved in converting from one format to another.

If the proposed settlement required Microsoft to disclose the specification for these file formats, in addition to the disclosure requirements contained in the existing proposals, then companies would be able to produce products which handled these files correctly, and consumers would be able to switch between Microsoft and non-Microsoft products at will, and could mix and match as it suited them. Possibly they might retain the Microsoft product to handle spreadsheets, but use a competing company's word processor. The important thing is that consumers would have a genuine choice, since all products would be able to handle their data.

Perhaps the most worrying aspect of the current proposed settlement is the large number of exemptions it provides for Microsoft. Microsoft gets a number of exemptions from the proposed provisions on grounds of security, anti-piracy, remote administration and various other headings. Taken together, they provide the means for Microsoft to exempt practically everything it does from the provisions of the proposed settlement. It is surely no coincidence that Bill Gates has started making speeches about how security comes first, and how security will be built into everything the company does from now on. If security is an integral part of everything Microsoft does, then everything Microsoft does can be exempted from the terms of the settlement.

Whilst it is clear that the motive behind these exemptions is a noble one, in practice they are so wide as to render the settlement worthless. In my opinion, Microsoft has forfeited the right to this kind of consideration by dint of its long history of unlawful activity. The most important thing now must surely be to ensure that competition is introduced into the marketplace, and that Microsoft has no way to continue its illegal monopoly.

In a related matter, it seems clear to me that the access provisions specified by the proposed settlement need to be radically expanded. In particular, the definitions need to be adjusted to include those companies and individuals producing products for non-Microsoft operating

systems which might need to interact with Microsoft products. Provision III J 2 which allows Microsoft to determine the authenticity and viability of a business, is particularly dangerous in this respect. Microsoft's hostility to open source and free software developers is well known. One Microsoft executive even went so far as to describe them as un-American. By allowing Microsoft to exclude developers simply because they operate on a different business model, the settlement does much to restrict one of the most vibrant and expanding areas of computing, and guarantees that a large number of legitimate users and developers are excluded from benefitting from the settlement provisions.

In summary, then, let me say this. I have neither the time nor the expertise to fully draft a proposed settlement of my own, but it seems to me that there are certain key elements that are essential if the proposed settlement is to effectively dismantle the Microsoft monopoly and introduce genuine competition.

1. Tighter drafting, with far fewer loopholes and potentially litigious language.
2. Actively seeking to promote competition and encourage consumers to exercise choice.
3. Reducing the costs inherent in converting between Microsoft and non-Microsoft products.
4. Removing the exemptions which would allow Microsoft to preserve its monopoly.
5. Ensuring that all business, whatever their nature, have access to the information they require to compete effectively.

There is one final matter which I would like to touch on. In the discussions that have occurred since the proposed settlement was published, a new word has been invented. That word is "Seattlement". As is doubtless obvious, it has arisen because the proposed settlement is seen as having been drafted by Microsoft for their own benefit, without any regard to the actual merits of the case. If the court imposes this settlement unmodified, it will be seen around the world as having capitulated utterly to Microsoft, and to have failed completely to regulate its behaviour or dismantle its monopoly. The Department of Justice will be seen as either completely ignorant of the realities of the case, or more likely as having been bought and paid for by Microsoft and its lobbyists.

The law is the law, and if it is to mean anything, it must apply equally to everyone. Justice must be done, and must be seen to be done. Rich and poor, large or small, all need to have equal protection under the law, or the law becomes meaningless. If this settlement is approved un-amended, it will send the signal that justice in the United States is a commodity. The more you can afford, the more you get. No money, no justice. Surely this is not the message that the court wishes to send to the American public, the American business community, or the world.

So in conclusion, it is my belief that this settlement is fundamentally flawed and needs almost complete re-drafting. Not only does it do nothing to damage Microsoft's unlawful monopoly, it actively enshrines that monopoly in law. It doesn't serve the consumer, it doesn't serve the software industry, and it doesn't serve justice; it benefits only Microsoft. For the first time, the law will create a situation in which the criminal is not only allowed to benefit from his crime, but to keep on benefitting from it with the full protection of the courts.

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